
UTAH LABOR COMMISSION

VICKIE CHATTERLEY,

Petitioner,

vs.

**VARSITY CONTRACTORS, INC. and
TRANSPORTATION INSURANCE CO.,**

Respondents.

**ORDER REVERSING
ALJ'S DECISION**

ORDER OF REMAND

Case No. 05-0453

Vickie Chatterley asks the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of permanent total disability compensation under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Chatterley claims permanent total disability compensation from Varsity Contractors, Inc. and its insurance carrier, Transportation Insurance Co., (referred to jointly as "Varsity") for a right-wrist injury that occurred on June 8, 2004. After holding an evidentiary hearing, Judge Marlowe denied benefits on the grounds that Ms. Chatterley's wrist injury is not the "direct cause" of her disability.

In her motion for review, Ms. Chatterley disputes Judge Marlowe's finding that her wrist injury is not the direct cause of her disability.

FINDINGS OF FACT

The following facts, including supplemental facts from the medical record, are material to the issues raised in the motion for review:

Ms. Chatterley has a history of medical problems, including a preexisting back condition from a 1985 injury that left her with a permanent 5% whole person impairment. Ms. Chatterley's work history includes heavy labor and/or lifting as a coal miner, home health aide, head cook and cashier. At Varsity, Ms. Chatterley worked as a janitor. Her duties included mopping, vacuuming, emptying garbage, and shoveling snow.

On June 8, 2004, Ms. Chatterley, who is right-handed, injured her right wrist at work while forcibly twisting off a mop head. She was diagnosed with a ligament tear and was initially released

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to full-duty work on June 15, 2004, but on June 30, 2004, she was placed on light duty with restrictions on use of her right arm of no lifting over two pounds and no repetitive pushing, pulling, grasping or twisting.

On or about July 12, 2004, while performing light duty work, Ms. Chatterley was dusting a low shelf and experienced back pain when she stood up. Dr. Knoebel, Varsity's medical consultant, concluded that this incident only temporarily exacerbated Ms. Chatterley's pre-existing back condition and that Ms. Chatterley's back returned to its "baseline level" shortly after the incident. Dr. Knoebel ratified the 5% impairment rating that had previously been given for Ms. Chatterley's back condition and opined that this impairment was entirely due to the 1985 injury.

After experiencing the above-described temporary back problem, Ms. Chatterley discontinued her light-duty work at Varsity. She then underwent wrist surgery on August 10, 2004. This surgery failed. Following a functional capacity evaluation on January 13, 2005, she was restricted to sedentary work due to her decreased lifting capacity. On March 11, 2005, Dr. Colledge concluded that Ms. Chatterley had reached medical stability. Dr. Colledge further concluded that Ms. Chatterley's right-wrist injury had left her with a 12% whole person impairment and permanent restrictions against lifting more than 10 pounds and repetitive pulling, pushing, grasping or twisting.

At the evidentiary hearing in this matter, the parties stipulated that: Ms. Chatterley's disability compensation rate is \$298.00 per week; her wrist injury is generally compensable under the Utah Workers' Compensation Act; she sustained a significant impairment as a result of the wrist injury; she is not gainfully employed; and she has an impairment, or combination of impairments, that limit her ability to do basic work activities.

DISCUSSION AND CONCLUSION OF LAW

Section 34A-2-413(1)(b) of the Utah Workers' Compensation Act requires that the following three elements be established before an injured worker is entitled to a preliminary finding of permanent total disability:

- (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
- (ii) the employee is permanently totally disabled [as determined by another four-part test found in § 34A-2-413(1)(c)]; and
- (iii) the industrial accident . . . was the direct cause of the employee's permanent total disability.

The parties have stipulated that Ms. Chatterley sustained a significant work-related impairment, thereby satisfying the first of the statute's three elements. Judge Marlowe found Ms. Chatterley's circumstances also satisfied the statute's second element that she is permanently and

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totally disabled according to the tests set out in subsection 413(1)(c). However, Judge Marlowe concluded that Ms. Chatterley did not meet the statute's third element--that her work-related wrist injury is the "direct cause" of her permanent total disability. Ms. Chatterley disputes this aspect of Judge Marlowe's decision and contends that her wrist injury is, in fact, the direct cause of her disability.

In considering this question, the Commission notes that, prior to her wrist injury, Ms. Chatterley engaged in heavy lifting and other strenuous activity such as shoveling snow and removing garbage in her duties as a janitor. She was able to perform these duties even though she suffered from a pre-existing back condition. And, while Ms. Chatterley exacerbated her pre-existing back condition on July 12, 2004, the opinion of Dr. Knoebel, Varsity's own medical consultant, establishes that this exacerbation was only temporary and that her back returned to its baseline level shortly after the July 2004 incident.

Even though Ms. Chatterley's back has now returned to its previous condition, she remains unable to work. Her wrist injury is the only substantial and permanent change that has occurred since she was last able to perform her regular work assignment. More specifically, Ms. Chatterley now has permanent physical limitations against using her right arm to lift more than 10 pounds or engaging in repetitive wrist motion, including fine-movement manipulation, pushing, pulling, grasping or twisting. Her wrist injury has left her with a permanent 12% whole person impairment, which far exceeds the 5% impairment attributable to her preexisting back condition. Taken together, these facts convince the Commission that Ms. Chatterley's right wrist injury is the direct cause of her permanent total disability.

The Commission notes Varsity's argument that, because Ms. Chatterley returned to work after her wrist injury and continued to work until the exacerbation of her back condition on July 12, 2004, it is the back injury that is the cause of her disability. However, Ms. Chatterley was **only** performing light-duty work, and even this return to light-duty work occurred before her failed wrist surgery in August 2004.

In summary, the Commission finds that Ms. Chatterley's work-related right-wrist injury is the direct cause of her permanent total disability. Ms. Chatterley has therefore satisfied § 34A-2-413(1)(b)'s third and final requirement for a finding of permanent total disability.

ORDER

It is hereby ordered that Ms. Chatterley is entitled to a preliminary finding of permanent total disability under § 34A-2-413(1) of the Utah Workers' Compensation Act, subject to Varsity's right under § 34A-2-413(6) of the Act to submit a plan to reemploy or rehabilitate Ms. Chatterley.

It is further ordered that Varsity immediately pay subsistence benefits of \$298 per week to Ms. Chatterley, commencing on March 11, 2005, and continuing until otherwise directed by Judge

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Marlowe or the Commission. Varsity shall pay the amount of any accrued benefits to Ms. Chatterley in a lump sum, together with interest thereon at 8% per annum on any accrued payments. In computing the amount due Ms. Chatterley, Varsity may offset any disability compensation previously overpaid to Ms. Chatterley.

It is further ordered that Varsity shall deduct from the disability compensation otherwise due Ms. Chatterley attorney's fees in the amount established by Commission rule R602-2-4. Varsity shall then pay the attorney's fees so deducted directly to Marsha S. Atkin, Esq., Ms. Chatterley's attorney in this matter.

It is further ordered that Ms. Chatterley's claim be remanded to Judge Marlowe for further proceedings necessary to receive and pass upon Varsity's reemployment/rehabilitation plan for Ms. Chatterley, if any such plan is proffered, and for such other action as is necessary to resolve this matter.

Dated this 18th day of July, 2008.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.